

DATE: January 18, 1995

Case No.: 94-STA-11

IN THE MATTER OF

LORAIN WHITE,
Complainant,

v.

MAVERICK TRANSPORTATION, INC.,
Respondent.

APPEARANCES: Kathleen Caldwell, Esq.
For the Complainant

Russell Gunter, Esq.
For the Respondent

BEFORE: Richard K. Malamphy
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

PRELIMINARY STATEMENT

Complainant, Loraine White, brought this action against Respondent, Maverick Transportation, Inc., alleging that Respondent discriminated against her in violation of the whistleblower provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. Appx. § 2305. Specifically, Ms. White contends that she was discharged in retaliation for her complaints about being required to drive in violation of Department of Transportation Rules and Regulations. Ms. White asserts that she resisted and complained, one, when she was required to drive excessive hours, two, when Maverick caused her truck to be overloaded, and three, when, on one occasion, she was instructed by the dispatcher to drive around a weight scale because her truck was overloaded. As a result of her complaints,

Ms. White posits that she was tagged and marked as a trouble maker or whistleblower, which resulted in her discharge.

Respondent contends that Ms. White did not engage in any protected conduct, and was discharged because she had a propensity to run overweight loads in violation of company policy, and because she had a bad attitude. According to the Respondent, Complainant has failed to set forth even a *prima facie* case of illegal discrimination under the STAA because she cannot show that she filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of any Department of Transportation rule or regulation.

Ms. White filed a complaint with the U.S. Department of Labor on December 24, 1992, alleging that she was fired by Maverick Transportation, Inc. because she refused to violate Federal Motor Carrier Safety Regulations. The Department's Regional Administrator investigated the complaint pursuant to Section 405 of the Surface Transportation Act, 49 U.S.C. § 2305 (1982). He found, first, that Ms. White had exceeded the regulatory hours of service and was counseled and placed in a probationary status for this violation. Second, the Administrator noted that there was no "neutral" evidence regarding Ms. White's allegation that she refused instructions to avoid weight enforcement points (scales) when she was overloaded. Because the issue was "one's word against the other," the Administrator concluded that this issue was unresolved. Finally, the Administrator concluded that Ms. White was not fired for her refusal or complaints about hauling overweight loads. Rather, she was discharged after, twice in one month, she violated Maverick's policy against hauling overweight loads. Ms. White requested an administrative hearing.

The hearing in this matter was held on June 7 and 8, 1994, in Little Rock, Arkansas. Both parties appeared at the hearing and submitted post-hearing briefs.¹

STIPULATIONS

The Complainant and the Employer stipulated to the following, and I find:²

1. Respondent, Maverick Transportation, Inc., "Maverick," is engaged in interstate trucking operations and maintains a place of business in Little Rock, Arkansas.

¹ Because the Complainant's brief was filed subsequent to October 28, 1994, the briefing date agreed upon at the hearing, the Administrative Law Judge granted permission to the Respondent to file a responsive brief. However, the Respondent indicated on November 17, 1994, that it was willing to rely on its previously filed brief because Complainant's brief did not address the arguments and issues raised in Respondent's brief.

² The Stipulations were set forth at the hearing. (Tr. 5).

2. In the course of its business, Respondent's employees operate commercial motor vehicles principally to transport common freight.

3. Complainant, Loraine White, was such an employee and, as a driver, she hauled commercial freight for Respondent.

4. Respondent, Maverick Transportation, Inc., was at all material times a person as defined in Section 401.4 of the Surface Transportation Assistance Act, 49 U.S.C. Appx. § 2301 (4).

5. On April 23, 1992, Maverick Transportation, Inc., hired Loraine White as a driver of a commercial motor vehicle, namely a tractor-trailer with gross weight rating in excess of ten thousand pounds.

6. That as a driver of a commercial motor vehicle, Loraine White used highways and interstate commerce to transport common freight on behalf of her employer, Maverick Transportation, Inc.

7. That Loraine White, as a driver of a commercial vehicle, acting as an employee of Maverick Transportation, Inc., and operating to transport cargo, in the course of said employment directly affected commercial motor vehicle safety, pursuant to 49 U.S.C. Appx. § 2301 (2)(A).

8. From date of hire (April 23, 1992) to date of termination (October 29, 1992) Loraine White earned gross wages from Maverick Transportation, Inc., in the amount of \$11,652.52.

9. Loraine White made adequate efforts to find subsequent employment sufficient to fulfill her obligation to try to mitigate her damages.

ISSUE

WHETHER LORAIN WHITE ENGAGED IN
PROTECTED ACTIVITY UNDER THE
SURFACE TRANSPORTATION ACT OF 1982,
RESULTING IN HER DISMISSAL ON OCTOBER 29, 1992?

FINDINGS OF FACT³

I. **Maverick Transportation's Company Policy**

Maverick Transportation, Inc., "Maverick" or "Respondent," based in Little Rock, Arkansas, is engaged in interstate trucking operations in which its employees operate commercial motor vehicles principally to transport common freight. Maverick has instituted numerous policies concerning safety, number of hours to be driven, and the hauling of overweight loads. These policies are published and distributed to Maverick's employees in the Company Policies Manual. (RX-2).

Maverick's policy on driving hours is set forth in the Company Policies Manual as follows:

1. Do not drive over ten hours without a legal eight-hour break.
2. Make and show a vehicle inspection every 24 hours.
3. When you reach 15 hours on duty, you must take a legal eight-hour break before driving again.

* * *

If you have any questions about DOT logging regulations or our log policy, please contact the log department.

(RX-2 at 37-38). Maverick's employees testified that it is the policy of Maverick Transportation for its drivers to run legal hours, without exception. (TR-197-98, 218-19, 238-30, 366).

Maverick's policy with regard to hauling overweight loads is also set forth in the Company Policy Manual as follows:

The driver will be held responsible for overload/overweight tickets.

* * *

³ The following abbreviations will be used as citations to the record:

CX - Complainant's Exhibits
 RX - Respondent's Exhibits
 TR - Transcript

Weigh all loads. Do not assume weight is correct and load placement on trailers is correct. Maverick will not pay overweight tickets.

* * *

Never accept estimates of any customer as to the weight of his load. If they do not have a scale, find one; weigh your load. Customers do not pay estimates! Customers will not pay your overweight fine if their estimate is wrong.

(RX-2 at 10, 14, 22).

Complainant was instructed in the Company's policy through the Company Policy Manual and Company orientation when she began work. (TR-91).

II. Complainant

Loraine White, "Complainant," was hired by Maverick Transportation, Inc., Respondent, on April 23, 1992, as a flatbed tractor-trailer driver. (TR-18). She has been driving commercial tractor-trailers since 1988. (TR-19). Complainant testified that each time she has been hired on to a new job driving commercial trucks and trailers, including her hire with Maverick Transportation, Inc., she was given a written examination on all the rules and regulations pertaining to driving an eighteen-wheel vehicle. (TR-22). Complainant contends that she was fired by the Respondent because she resisted and complained about Maverick's requirement that she drive in violation of these rules and regulations.

A. Excessive hours

Under the United States Department of Transportation Federal Motor Carrier Safety Regulations, a driver is prohibited from driving more than ten hours following eight consecutive hours off duty. As well, after drivers of large vehicles have been on duty for fifteen hours, including non-driving time, they may not drive without taking eight consecutive hours off duty. Finally, a driver may not drive for any period after the driver has been on duty for more than 70 hours in any period of eight consecutive days. See 49 C.F.R. § 395.3(a) and (b), (RX-1 at 30).

Complainant testified that she complained to her supervisor, Hugh Brown, about being required to run beyond the ten-hour and fifteen-hour rules. (TR-28). Hugh Brown was a terminal manager, also known as a dispatcher, at the time Complainant was employed by Maverick. (TR-29). Complainant said that she complained to him twice in person and he just ignored her or walked away. (TR-29). The first time Ms. White spoke to Hugh Brown about her concerns was at least two or three months after she began working at Maverick. (TR-29). She told him that she

did not like being handed two or three log books, that she did not know how to run them, and that she did not know anything about them. (TR-29).

Complainant explained at the hearing that a driver should only be issued one log book for a 31 day period, because drivers are only allowed to run 70 hours in eight days. (TR-30). Running multiple log books is against Federal regulations. (TR-65). Some drivers run multiple log books illegally in order to work more than the allowable hours in a given period without being detected. A driver who was running out of hours in a period would run two log books by taking days off, then starting another log book. (TR-66). Complainant said that other drivers at Maverick ran multiple log books, including one man Complainant identified only by his "handle" as "Lickum Stickum." (TR-66).

According to Complainant, when she went to the main office to pick up her log book, she was handed two or three books and told by whomever was in charge, "just take these and run like hell." (TR-30). When Complainant reported to Hugh Brown that she did not know how to run more than one log book, she said he gave her a "just forget it" type attitude and walked away. (TR-31). Complainant admitted that she was never specifically instructed by anyone at Maverick to falsify her log books. (TR-67).

Complainant approached Hugh Brown on another occasion about her concerns that she was driving more hours than permissible under the regulations. (TR-34-35). At the hearing Complainant said that sometimes she drove more hours than she was supposed to be driving because she was required by the company dispatcher to get the load there on time, regardless. She testified that she was not able to call the dispatcher and tell them she had to pull over and rest for eight hours. Complainant felt that if she had done that, she would have violated the company policy to get the load in on time. According to Complainant, if she was unable to make her load on time, the company would "have a rejective attitude" and "give you a really bad time." (TR-35).

Complainant explained at the hearing that loads were assigned by dispatchers directly to the drivers via satellite messages to a small screen in the cab of the tractor-trailer. (TR-163). The initial message instructed the driver where to deliver the load and detailed the estimated date and time of arrival. (TR-164). According to Complainant, when she received a message to pick up a load, she felt that she could not decline the load even if she had too many hours and needed to take eight hours off. (TR-165).

Complainant testified that there was an unwritten policy at Maverick that drivers were allowed to run loads with no logs. In order to keep on schedule, many drivers made complete runs without a log. (TR-168). Complainant said that unlogged trips can be detected by looking at the bills of lading signed by recipients of various loads, and noting that there are no logs for those runs. (TR-169). The purpose of running without a log was to enable the driver to drive hours in excess of the legal limit without a rest. (TR-168). Complainant observed that everyone in the office knew about this procedure, and that other drivers, in addition to Complainant, were doing it, though Complainant did not recall who these drivers were. (TR-170).

When Complainant talked to Hugh Brown regarding the hour problem, he walked away and left Complainant without giving her any ideas or suggestions as to what she could do. (TR-35). Although Complainant had meetings with several individuals in management at various times during her employment, Hugh Brown was the only person with whom Complainant claims she discussed her concerns about running over on time. (TR-37).

Complainant's personnel file contains warnings to Complainant from the Log Department notifying Complainant that she was in violation of the 10-hour and 15-hour rules on several occasions between May 1992 and September 1992. (RX-1 at 58, 61-63, 66-72, 75-76, 80). The notifications sent to Complainant in July 1992 state, "Remember, it is this company's policy that if you are issued future notifications of log violations, you may receive an out of service notice for up to 14 days or possibly termination of your services." (RX-1 at 80). Complainant stated at the hearing that she never received any of these notices, in spite of the company's policy to place the warnings in the envelope with the paycheck. (TR-102-03). A notation from Diane Caine, the head of the Log Department, on one of Complainant's warnings indicates, "Talked with Loraine on 7/6/92 about the 10 & 15 hour vio[lations] in 2nd quarter - She now understands the rules." (RX-1 at 69). Complainant testified, however, that although Ms. Caine did stop and talk with her, Ms. Caine did not say that she wanted to talk to Complainant about log violations. Complainant said they just had a conversation one day when Complainant wandered into the office, and the subject of the 10 and 15-hour rules came up. (TR-103-05).

B. Overweight assessment

Complainant received a notice of 90-day probation dated October 12, 1992. (RX-1 at 96). The notice indicated that Complainant was being placed on probation as a result of an overweight assessment received on a load she picked up in Indiana on October 5, 1992, and because of her performance and attitude towards customers and other Maverick employees. (RX-1 at 96). With regard to the referenced overweight assessment, Complainant was dispatched to pick up a load of lumber from Indiana on October 5, 1992, destined for Texas, with an estimated time of arrival at 7:00 a.m. on October 7, 1992. (RX-1 at 90). When she arrived at the shipper's address on October 5, 1992, she was told that she was a day early. (TR-43). Complainant contacted Maverick and tried to explain the problem to someone, but, she testified, the person she spoke with was very rude. As she was talking with this person, Complainant thought at one point that the conversation had ended, so she hung up the phone. (TR-43). A notation in Complainant's personnel file from Lori Shirkey in Maverick's main office, regarding a call from Complainant on October 5, 1992, states, "Loraine checked in by phone, I was still talking, and she hung up on me." (RX-1 at 91).

Complainant did manage to get her truck loaded later that day, just before closing time, but she noticed while the company was loading her trailer that it seemed to be overloaded. (TR-45-46). Complainant's impression was based on the type of lumber and the height to which it was stacked. However, when she complained to the persons loading the truck that they might be overloading, they responded, "No we're not." (TR-46). When Complainant went inside to call

Maverick, she testified that the attitude of the person on the other end of the phone was , "Get the truck loaded and get out of there and don't say anything." (TR-47). Complainant said that no one at Maverick ever told her what to do if a customer insisted on overloading her trailer. (TR-47).

When Complainant left the company the truck was pulling heavy so she circled around and came back to the company. When she got back, however, the gates had already been locked. (TR-48). Complainant said that there was no way to check the weight of the trailer because there were no private weigh scales until Seymore, Indiana, after the state scales. (TR-44). When Complainant went past the state scales, she was not stopped by the officials. The state scales were axle scales, meaning that the trailer was weighed one axle at a time. Complainant did not realize that a trailer could be legal on each axle, but overweight as to the entire load. (TR-45).

After she was on the highway, Complainant said she contacted Hugh Brown at home with a question about the bill of lading and the destination of the load. (TR-49). Hugh Brown assured her that the load was going to Texas and that she should just take the load and go on. Complainant told him that she thought the truck was overloaded, but he responded, "I don't think so." Complainant said he did not want to talk to her and he brushed her off. (TR-49).

Complainant was ticketed for the overweight load in Tennessee on October 6, 1992, after passing through state scales in Indiana and Kentucky. She was not ticked in either Indiana or Kentucky because those states only have axle scales, and Complainant was over-grossed not over-axled. (TR-50). Complainant testified that she pulled off at the next exit and weighed the truck privately, which revealed that the truck was overweight by about 4000 pounds.⁴ (TR-51-52). When Complainant called Hugh Brown, he responded by sending another driver to meet Complainant at mile marker 126 on Interstate 40 in Tennessee, and take off part of the load if possible. (TR-52).

Complainant testified that the other driver did not take off part of the load. Instead, Hugh Brown told Complainant that the other driver would accompany her in going around scales, which meant driving back roads and bypassing the Brownsville area scales. (TR-53-54). However, the other driver did not go around scales with Complainant. (TR-54). Complainant alleges that Hugh Brown routed her around weigh scales on her intended route into Arkansas. (TR-54). According to Complainant, after Hugh Brown went off duty at 5:00 p.m., Darius Cooper, who had a position in management, finished routing her around three other scales in Arkansas. (TR-55-56). Complainant said she was not routed around scales in Texas because there were no weigh scales on the interstate in that area. (TR-57).

When Complainant arrived at the destination with her load, the company refused to unload her because they did not have a description of the lumber. Nothing had been faxed to them about

⁴ In contradiction to Complainant's testimony that her truck was overweight by 4000 pounds, the Overweight Assessment issued against Claimant on October 6, 1992, reveals that Complainant's vehicle exceeded the authorized weight by only 1260 pounds. (RX-1 at 92 and 93).

the shipment. (TR-57). Complainant contacted Maverick regarding this problem, though she did not recall which individual she spoke to on the phone. (TR-58). The person at Maverick with whom Complainant spoke told her, at first, that she was being rude to the customer. Complainant did not understand at that time that the company should have had papers showing the lumber. (TR-59). After the phone call, Complainant believed that someone from Maverick faxed down a description so that her trailer could be unloaded. (TR-59). Complainant testified that she was not rude to the customer either in Texas or Indiana. (TR-59).

C. Complainant's Probation

After this incident, Complainant met with Connie Payne, Maverick's Operations Manager. (TR-71). Ms. Payne told Complainant that they were placing her on probation because she had a bad attitude. According to Complainant, Ms. Payne was concerned that Complainant was being rude to customers. (TR-72). On that occasion, Complainant said that Ms. Payne only reprimanded her for her attitude. She did not mention any problems with overloading. (TR-72). As well, Ms. Payne did not show her any forms indicating that Complainant had been working too many hours under the 10 and 15-hour rules, or that her log books were not right. (TR-73). Complainant signed the portion of the notice of 90 day probation, dated October 12, 1992, which stated: "I understand that my continued employment will depend on my work performance and my attitude. The probationary period will continue through January 12, 1993." (RX-1 at 96).

2. Complainant's Termination

Subsequently, Complainant overloaded the spread axle of her trailer on October 22, 1992. On that date at Weirton Steel Complainant set up to load steel coils, but she did not order the steel down onto her trailer. An employee of Weirton Steel jumped onto her trailer and directed the steel to be lowered down. (TR-41). When Complainant weighed the load at a private scale several miles away in Ohio, she found that she was 1200 pounds overweight on the rear axle. (TR-41). Maverick paid to have the load moved within the trailer, but Complainant called in the next day to report that she was still overweight on the spread axle. (RX-1 at 104).

Philip Nibeck, a Maverick employee who has held positions as a truck driver, a trainer, a driver/trainer on the road, and an officer in charge of orientation as well as training, testified with regard to Maverick's expectations of a driver when an overload situation occurs. (TR-375). Mr. Nibeck explained that when a driver is on site where his truck is being loaded, he has control over the loading. If the driver feels that the load is improperly loaded, the driver should refuse to sign for the load. If the driver refuses to sign for the bills and notifies the shipper that the load is not correct, then the loader has to correct the situation. (TR-375). Mr. Nibeck stated that on occasions when he has picked up a shipment that was improperly loaded, he returned to the shipper to have the problem corrected. (TR-378).

As a result of Complainant's repeat loading violations during her probationary period, Maverick terminated Complainant's employment on October 29, 1992. (RX-1 at 104, TR-82). A letter from Connie Payne, Operations Manager, dated October 29, 1992, provides:

Loraine White was terminated 10/29/92 for the following reason:

90 day probation began 10/12/92. The condition of the probation was that we seen [sic] noticeable improvement on performance. On 10/22/92 Loraine overloaded the spread axle and we paid to have the coils moved. Once the coils were moved, Loraine called in the next day and admitted that she was still over on the spread axle after paying to have the coils moved.

(RX-1 at 104).

When the Complainant filed for unemployment compensation after her discharge, she indicated on the form that the reason for her discharge was, "got hurt on job." (RX-1 at 108). Connie Payne, the Operations Manager, denied that this was the reason for discharging Complainant when she responded to the Arkansas Security Department investigation. (TR-1 at 109). Ms. Payne, instead, explained that Complainant was fired for her work performance and negative attitude and her repeated policy violations while on probation. (RX-1 at 110).

III. Lynn Johnson, Operations Manager

Lynn Johnson, Operations Manager for Maverick, testified that he has never heard a dispatcher or Fleet Manager distribute multiple log books and tell drivers to "run like hell." If he had heard such statements, he said he would immediately take corrective measures. (TR-242). Johnson said that Maverick has no written or unwritten policy regarding allowing multiple log books to be distributed to the drivers. According to Johnson, "You can have as many log books as you choose. You can have 300 if you have the space to carry them." (TR-243).

Mr. Johnson testified with regard to overweight loads, that it is the driver's responsibility to go to the closest public scale and get the product weighed on that tractor and trailer. (TR-220). If the load is overweight on the spread axle and not on the gross, Maverick will try to get the shop to help locate a crane or forklift to move or shift the product so that the truck can be made legal. (TR-220). However, if the truck is overloaded on gross weight, the options are more limited. The first option is to send the driver back to the customer to remove part of the load and put it back into storage. (TR-221). The second alternative, if the driver has gone too far down the road, is to transfer part of that product to another tractor-trailer rig. (TR-221). Occasionally, the amount of fuel may help the driver. If the driver can burn off 100 gallons of fuel, she can reduce the gross weight by 800 pounds. Generally, however, an overgross problem should be taken care of immediately. (TR-221).

Mr. Johnson said he has never instructed a driver with an overweight load to run around scales by back roads. (TR-222). He explained that the moment you go behind those scales, you are dropping down to a road that has a much lower weight allowance. If the driver was caught, the fines would multiply very quickly. (TR-222). According to Mr. Johnson, the company is much better off if the driver crosses the state scales and pays the fine. (TR-222). He testified that he would never allow a fleet manager to tell a driver to drive around a scale; if he learned of such behavior, he would place the fleet manager on probation. (TR-250-51).

In May 1993, officers from the United States Department of Transportation, Federal Highway Administration, notified Mr. Johnson that they would be conducting an audit of Maverick Transportation. (TR-278). Following the four day audit, the auditors requested an exit interview with Mr. Johnson and Larry Leahy, Maverick's Vice President of Operations. (TR-279). The auditors explained that they found some violations among the almost 700 documents they checked. They told Johnson and Leahy that Maverick might be fined for these violations and they gave recommendations and guidelines to bring Maverick into compliance. (TR-279).

The audit report dated May 14, 1993, reveals that the auditors found, among other violations, 170 false reports of record of duty status, out of 505 checked. (RX-3). Of the 25 drivers or vehicles checked by the auditors, 20 were found to be in violation of log requirements. (RX-3). The report states: "Driver logs, when compared to independent documents, i.e. fuel receipts, are inconsistent on times and dates. Example: driver Josh A. Taylor's log on 01/06/93, 10:48 AM shows Anniston, AL, fuel receipt shows Peru, IN."

As a result of the audit and the recommended guidelines, Larry Leahy distributed a memorandum informing Maverick employees of the nature and outcome of the audit. (RX-3). In that memorandum, Mr. Leahy stated:

[T]he auditors did discover that 34% of the logs they reviewed contained inaccurate entries. They compared fuel purchases, weight tickets, shipping orders and various other dated and time stamped documents to the driver's logs to find the inaccuracies. The result of their audit is that Maverick will be fined and that they will return for a follow up audit after six months.

* * *

We have not placed sufficient emphasis in the past on the importance of logs matching all documentation but we are committed to correcting that error and so we ask every driver to make the extra effort to insure that their logs are accurate and that, beginning immediately, they log each fuel stop.

(RX-3).

IV. Darius Cooper, Director of Driver Services

Darius Cooper, the Director of Driver Services for Maverick, testified that on October 5, 1992 he was working the night dispatch because the regular dispatch was on vacation. (TR-354). He received a message from Loraine White at 6:00 p.m. that evening indicating that she was leaving the shipper with a load which she planned to deliver by 7:00 a.m. on October 7, 1992. (TR-355). Mr. Cooper testified that he was familiar with this route, from Illinois to Texas, and that it definitely could be run within a driver's legal time restrictions. (TR-355).

Complainant received an overweight ticket on that trip in Tennessee indicating that she was exceeding the legal gross weight on her trailer by 1260 pounds. (TR-359). With regard to Complainant's testimony that Hugh Brown routed her around scales in Tennessee and Arkansas, Mr. Cooper stated that it would not make any sense to route a driver around scales after they have a ticket. (TR-359). Once a truck has been issued a citation in Tennessee, as long as that vehicle is not over 85,000 pounds of gross, or over 40,000 pounds on any tandem, then it will be allowed to proceed through the state, within a 24 hour period, without further penalty. (TR-360). Even if Complainant had come to another scale farther down the road, all she had to do was show her ticket and she would have been allowed to move on. (TR-360).

Mr. Cooper also explained that between Tennessee, where Complainant was ticketed, and Arkansas, Complainant had to travel approximately 240 miles, which would have burned off about 40 gallons of fuel weighing 320 pounds. (TR-360). That would have put her at a gross weight of less than 1000 pounds over the legal limit. (TR-360). Mr. Cooper opined that Complainant's testimony that he helped route her around scales in Arkansas made no sense. The State of Arkansas, as a rule, will allow one percent tolerance on overweight before a citation is issued or any conflict is made with the driver. (TR-361). Based on the fact that Complainant would have burned off 320 pounds of fuel before reaching Arkansas, Mr. Cooper said that Complainant would have had clear passage through Arkansas. (TR-362). The evening that Complainant got her overweight ticket, Mr. Cooper had no verbal conversations with Loraine White; all of their communication was by satellite transmission. (TR-362).

Several days after Complainant received the overweight citation, Mr. Cooper became aware that Connie Payne wanted to put Complainant on probation. (TR-362). He said the reason Connie Payne wanted to put Complainant on probation was because Complainant was a relatively new employee who failed to follow company policy. Mr. Cooper concurred in the determination to put Complainant on probation. (TR-362).

Not long after Complainant was placed on probation, Complainant overloaded a trailer on a load originating in Weirton, West Virginia. Complainant made it into Ohio before she realized it was overloaded. (TR-363). After this incident, Mr. Cooper reviewed Complainant's personnel record with Connie Payne. He consented in Connie Payne's ultimate decision to discharge Complainant from employment. (TR-363). He explained that Complainant was an employee who continued to have problems following company policy after being placed on probation. (TR-364).

Mr. Cooper stated that Loraine White never complained to him about being required to run illegal hours, or being required to run overweight. Mr. Cooper added that the policy at Maverick is that the drivers run legal hours, and until the hearing, he had never heard of any unwritten policy to the contrary. (TR-366). No one, including Hugh Brown, ever told Mr. Cooper that Complainant was concerned about being required to run illegal hours, or being required to run illegal weights. (TR-364). Hugh Brown had absolutely no input into the decision to put Complainant on probation or to fire her. (TR-365).

V. Connie Payne

At the time Complainant was hired, Connie Payne was the Driver Relations Coordinator for Maverick, later taking over as Operations Manager in September of 1992. (TR-294). As the Driver Relations Coordinator, Ms. Payne basically served as a buffer between the drivers and management. If Operations was having a problem with a driver, whether the problem was late deliveries or attitude, Ms. Payne would work with the driver before disciplinary action was taken. She would try to help the driver come back to an acceptable standard. (TR-298).

Ms. Payne testified at the hearing regarding Maverick's dispatch procedure. She explained that the dispatch is over the computer; it is normally not a verbal dispatch. (TR-295). The appropriate procedure for a driver who receives a dispatch on the computer and sees that there is a problem with hours would be either to send a message or call their Fleet Manager on the phone. (TR-296). The Fleet Manager would look at the order and determine whether the load could be delivered later or would contact the load coordinator and explain that the driver could not make the next day delivery. (TR-297-98). Ms. Payne said that this was how it worked when she worked as a Fleet Manager and that was how it worked during the time that Complainant was a driver for Maverick. (TR-296).

Ms. Payne met with Complainant on July 6, 1992 for a 60-day review. (RX-2 at 73). Ms. Payne testified that the meeting was not actually a performance review, but was mainly an opportunity to get feedback from new employees about how they liked the job. (TR-300). Ms. Payne noted that Complainant was having a problem with her logs. She discussed the problem with Complainant and instructed her to talk to the log department. (TR-301). At no time during that meeting did Complainant tell Ms. Payne that Fleet Managers were pressing her to run illegal hours or to run overweight loads. (TR-302).

Ms. Payne testified that after she was promoted to Operations Manager in September 1992, she did not have discussions with Complainant on a regular basis. (TR-305). When Complainant had problems with overloading her truck on October 5, 1992, Ms. Payne became aware of the situation. (TR-308-09). Ms. Payne also received a call from the General Sales Manager in Chicago reporting that Complainant was very rude to the shipper on that load. (TR-309). Ms. Payne determined that, additionally, Complainant had not followed company policy in getting her truck weighed on that load. (TR-310). As a result of this information, Ms. Payne consulted with her supervisor, Darius Cooper, Director of Driver Services regarding how

to handle Complainant. (TR-310). They determined that Complainant should be placed on probation. (TR-310).

The notice of 90-day probation was explained to Complainant by Ms. Payne in a meeting. (TR-311). Ms. Payne testified that she told Complainant that the purpose of the meeting was to discuss the incidents on the October 5 load. Specifically, Ms. Payne was concerned about: reports from the shipper and the consignee that Complainant was rude to the customers, the fact that Complainant had hung up on Lori Shirkey while Lori was trying to help her through a problem, the fact that Complainant did not weigh the load as instructed, and that Complainant had previous problems with her logs and with her supervisor, Hugh Brown. (TR-312). Complainant acknowledged that she needed to improve both her attitude and her performance, and she signed the notice of probation. (TR-313).

After Complainant was placed on probation, Complainant was again involved in an overweight problem with a load from Weirton Steel. (TR-313). Ms. Payne investigated and determined that Complainant had loaded her truck in such a way that she was overweight on the spread axle rather than on the entire load. (TR-314). Complainant was overloaded only as a result of her loading procedures, over which Complainant had direct control. (TR-314).

Ms. Payne recommended Complainant's termination on October 26, 1992. (TR-316). Ms. Payne drafted a memorandum to Letha Bryant, the Safety and Personnel Director, and Darius Cooper on that date detailing the basis for her recommendation. (TR-316, RX-1 at 101). The memorandum set forth four incidents involving Complainant, which Ms. Payne explained served as the basis for her recommendation. (RX-1 at 101).⁵ Ms. Payne testified that whenever termination is recommended, management officials must agree that the decision is in the best interests of the company. (TR-316).

⁵ The memorandum dated October 26, 1992, and addressed to "Letha, Darius" provides:

1. 10/10 Overweight in TN \$170.80
2. 10/22 Overweight on spread axle - \$150.00
Called in later and said was still over on spread but no other problems.
3. 10/23 Bent rim backing into consignee. \$16.00 pd. out of pocket.
4. 10/12 90 Day Probation Attitude and performance.
5. History of emotional problems does not address situations in a professional manner.

Ms. Payne testified that at the time she recommended termination, and up to that point, Complainant had never talked to her about being forced to run illegal hours or to run illegal weight. (TR-319). As well, no else reported to Ms. Payne that Complainant had concerns in this area. (TR-319). Hugh Brown did not recommend that Complainant be discharged, and Hugh Brown had no authority to discharge Complainant. Ms. Payne explained that Hugh Brown had no input into the decision to discharge Complainant or to put her on probation, and Hugh Brown never suggested that Complainant should be disciplined in any way. (TR-320).

On October 29, 1992, Ms. Payne held a meeting with Complainant to inform her of her discharge. (TR-321). Ms. Payne said she told Complainant that she was being terminated because she was unable to meet the requirements of the job or to handle the job functions. (TR-322). Complainant was angry and upset, but at no time during that meeting did Complainant express that she felt she was being fired because she was refusing or complaining about illegal hours or being forced to run overweight loads. (TR-322). At Complainant's request, Ms. Payne drafted a letter explaining that the reason for Complainant's termination was the violation of the terms of her 90 day probation by overloading her truck a second time. (TR-322, RX-1 at 104).

In an Application Cover Sheet Termination Form sent to Maverick's Personnel Department, Ms. Payne indicated the reason for Complainant's termination was "Loading violation during 90 day probation." (RX-1 at 105). Comments from Letha Bryant, the Safety Department officer, Darius Cooper and Connie Payne indicate that Complainant was very moody and did not handle criticism well, that she had too many problems, and that she was too emotional and could not handle pressures in a professional manner. (RX-1 at 105).

Ms. Payne testified that during the period of time that she has been employed at Maverick she never became aware of any unwritten policy or practice whereby Fleet Managers required drivers to run overweight or illegal hours. (TR-330). Ms. Payne, as well, has never told a driver to continue running overweight. If a driver called in with a 500 pound overgross, Ms. Payne said they would consider their options, either to remove some product, burn off fuel, remove some equipment, or send another driver and move product onto another unit. (TR-330-31).

DISCUSSION

Complainant, Loraine White, alleges that Respondent, Maverick Transportation, Inc. ("Maverick"), discriminated against her in violation of Section 405 of the Surface Transportation Act of 1982 (49 U.S.C. §305(a)). The Act provides in pertinent part:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee . . . has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial

motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.⁶

In order for a complainant to set forth a *prima facie* case of discrimination under the Act, she must show by a preponderance of the evidence that she engaged in protected conduct, that she was subjected to adverse action, and that the respondent was aware of the protected conduct when it took the adverse action. Zessin v. ASAP Express, Inc., Case No. 92-STA-0033, (Final Dec. and Order of the Secretary, January 19, 1993). The complainant must also present evidence to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, 80-ERA-2 (Decision and Final Order of the Secretary, April 25, 1983).

Once a *prima facie* case is established, the burden of production shifts to the respondent to articulate a legitimate nondiscriminatory reason for its employment decision. The ultimate burden of demonstrating intentional discrimination rests with the employee. If the employer rebuts the *prima facie* case, then the complainant may demonstrate that the proffered reason was a pretext for discrimination. Id.; see also Wrenn v. Gould, 808 F.2d 493, 500-01 (6th Cir. 1987); and Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., 783 F.2d 50, 54 (6th Cir.), cert. denied, 478 U.S. 1006 (1986).

I. Complainant's *Prima Facie* Case

The parties agree that Complainant suffered an adverse employment action on October 29, 1992, when Maverick fired Complainant. (Stipulation 8). The controversy in this matter centers, instead, on whether the Complainant ever engaged in protected conduct, and, if so, whether the Respondent was aware of the protected conduct at the time the Complainant was fired. Complainant contends that the record shows a pattern of discrimination against her for her complaints regarding the company's demands for long hours and overloaded deliveries. First, by resisting and complaining about Maverick's illegal log practices, Complainant posits that she was tagged and marked as a troublemaker or whistleblower. She claims, as well, that she was discharged for complaining when Maverick caused her truck to be overloaded, and because she resisted Maverick's instructions, on one occasion, to drive around weigh scales with her overloaded truck in violation of state law.

⁶ Preliminarily, the Respondent suggests that it is doubtful that the Surface Transportation Act applies to a claim based on complaints about state weight regulations because these do not constitute a commercial motor vehicle safety rule under the meaning of the statute. This defense is without merit. It is reasonable to assume that an overweight vehicle presents a risk of serious injury to the driver or to the public due to the unsafe condition of the equipment. The statute contemplates protection for complainants who report violations of safety rules, regulations, standards or orders. See Boone v. TFE, Inc., Case No. 90-STA-7, (Final Dec. and Order of the Secretary, July 17, 1991). Because the Complainant's claim regards unsafe, overweight driving conditions, it should be covered under the statute.

B. Excessive hours

To prove that she engaged in protected conduct by resisting Maverick's unwritten illegal log practices, the Complainant relies on her communications with her Fleet Manager, Hugh Brown. (TR-28-31). Though Complainant testified that Hugh Brown was the only person with whom she discussed her concerns about being required to commit log and hour violations, she claims that whenever she complained to him he ignored her. (TR-28-29, 39). Complainant said that she talked to Hugh Brown twice in person and he just ignored her and walked away. (TR-29).

According to Complainant, when she went to the main office to pick up her log book, she was handed two or three books and told by whomever was in charge, "just take these and run like hell." (TR-30). When Complainant reported to Hugh Brown that she did not know how to run more than one log book, she said he ignored her. (TR-31). Complainant admitted that she was never specifically instructed by anyone at Maverick to falsify her log books. (TR-67).

When Complainant spoke to Hugh Brown on another occasion, she was concerned about driving more hours than permissible under the regulations. (TR-34-35). At the hearing Complainant said that sometimes she drove more hours than she was supposed to be driving because she was required by the company dispatcher to get the load there on time regardless. She testified that she was not able to call the dispatcher and tell them she had to pull over and rest for eight hours. Complainant felt that if she had done that, she would have violated the company policy to get the load in on time. According to Complainant, if she was unable to make her load on time, the company would "have a rejective attitude and give you a really bad time." (TR-35). When Complainant approached Hugh Brown regarding the hour problem, he walked away and left Complainant without giving her any ideas or suggestions as to what she should do. (TR-35). She said he mostly gave her a "just forget it" type attitude. (TR-31).

Complainant asserts that Maverick had unwritten policies and practices in violation of Department of Transportation rules and regulations, which were evident in the attitude of her supervisors when she refused to keep illegal log books and resisted their demands to drive around weigh scales. (TR-168-70). Complainant suggests that the Department of Transportation finding in the May 1993 audit, that some Maverick drivers were operating in violation of log requirements, proves that Maverick had an established practice of requiring drivers to keep illegal logs. According to Complainant, her termination was a direct result of her resistance to and complaints about these, and other illegal practices.

As the Respondent points out, the Complainant's evidence is insufficient to show that the Complainant raised a safety issue regarding illegal hours, or that Maverick had knowledge that Complainant was making any such Complaints. Complainant testified that she never discussed or complained about being required to run illegal hours except to her Fleet Manager, Hugh Brown. (TR-37-38). The only significant complaint Complainant made was that she had been given more

than one log book. Complainant asks this court to infer that by distributing multiple log books, Maverick was requiring employees to run an illegal second log. However, the record does not support this assumption. Complainant herself admitted that there was nothing illegal about having more than one log book. (TR-153-54). Thus, Complainant's statement to Hugh Brown that she was concerned about receiving more than one log book because she did not know what to do with the log books, does not constitute a complaint that she was being forced to run illegal hours. Moreover, Complainant admitted that her later comments to Hugh Brown regarding possible hour violations were never acknowledged by him because he simply walked away.

Furthermore, the evidence reveals that Complainant did not make any complaints about being forced to run illegal hours to management when she had the opportunity. Despite a meeting with Diane Caine of the Log Department concerning how to accurately complete her logs, Complainant did not make any complaints to Ms. Caine or to the Log Department. Instead, Complainant's personnel file contains several warnings from the Log Department that Complainant was repeatedly in violation of the 10 and 15-hour rules and that she was counseled on Maverick's policies by a representative from the Log Department. (RX-1 at 58-80, 69). Complainant also had a number of meetings with upper levels of management, yet Complainant never mentioned to Connie Payne or other officers with the authority to discipline her, that she believed she was being forced to run illegal hours. (TR-35, 36, 219, 302-05, 320, 364). Even when Complainant was placed on probation, she did not complain that she believed she was being placed on probation because she was complaining about being required to run illegal hours. Neither did she make such an allegation at the time of her discharge. (TR-35, 310-12, 320).

The record does not support the Complainant's claim that her vague expressions of concern to Hugh Brown regarding multiple log books or pressure from the dispatchers to deliver on time constituted a report or complaint of safety violations.

B. Overweight Loads

In addition to her claim that she was discharged for complaining about Maverick's unwritten policy of requiring drivers to run in violation of Federal hour requirements, Complainant claims she was also fired for resisting Maverick's efforts to overload her truck and to route her around weigh scales in violation of state laws.

When Complainant picked up a load of hardwood lumber from a shipper in Indiana on October 5, 1992, she testified that she complained to the loaders that the truck might be overloaded, but they responded, "No we're not." (TR-46). On that occasion, Complainant claimed that the attitude of her contact at Maverick when she called for guidance was "get the truck loaded and get out of there and don't say anything." (TR-47).

Complainant admitted that she did not weigh the load immediately upon leaving shipper, per Maverick's company policy, because she did not know where the nearest scales were. (TR-44). When she was ticketed for the overweight load in Tennessee on October 6, 1992, she

contacted Hugh Brown. Complainant said that Hugh Brown responded by sending another driver to meet Complainant at mile marker 126 on I40 in Tennessee to take off part of the load if possible. (TR-52). Complainant claims that she was later told by Hugh Brown that the other driver would not be taking off part of the load, but would accompany her in going around scales, which meant driving back roads and bypassing state scales on the interstate. (TR-53-54). The Complainant stated, however, in contradiction to this testimony, that the other driver did not go around scales with her. (TR-54). She said that Hugh Brown routed her around scales on her intended route into Arkansas, and when he went off duty, Darius Cooper finished routing her around three other scales in Arkansas. (TR-55-56).

The Respondent counters that Complainant was terminated, not because she complained about being required to run overweight, but rather, because she was running overweight loads in violation of Maverick's policies and the terms of her probation. I find that the Complainant has failed to show that she made any complaints about the alleged requirement that she run overweight loads. Instead, Complainant claims that she resisted Maverick's efforts to route her around state weigh scales and to cause her truck to be overloaded. As a result of this resistance, Complainant contends that she was tagged as a trouble-maker, and consequently fired.

There is no evidence that Maverick caused the Complainant's truck to be overloaded or that Complainant resisted any efforts by Maverick to do so. Complainant said that she expressed to the loaders on the Indiana shipment of hardwood, her suspicions that the truck could be overloaded. Nevertheless, she signed off on the load upon the assurance from the loaders that the truck was properly loaded. (TR-46). Although Complainant testified that she was told by a Maverick dispatcher to get loaded and get out of there, the evidence does not support her claim that Maverick caused the truck to be overloaded or had knowledge that Complainant was resisting them in this matter.

Maverick's orientation officer, Phil Nibeck, explained that Maverick's policy is for the driver to take complete responsibility for ensuring that her shipment is properly loaded. (TR-375). If the driver suspects otherwise, the driver can control the load by refusing to sign off on the load and forcing the shipper to correct the situation. Through her orientation and company handbook, Complainant had knowledge that it is the driver's sole responsibility to make sure that the truck is properly loaded. (TR-91).

With regard to Maverick's alleged efforts to route the Complainant around weigh scales with an overloaded truck in violation of state laws, I find that Complainant's testimony is not credible. First, she claimed that she was overloaded by 4000 pounds (TR-51). Yet, the Overweight Assessment issued against Complainant in Tennessee, reveals that her vehicle exceeded the authorized weight by only 1260 pounds. (RX-1 at 92-93). Darius Cooper, Maverick's Director of Driver Services, explained that there is simply no advantage to running around scales. All of the states have significantly lowered the weight limits on all roads around where scales are located. Getting caught on one of these roads is much more expensive than

getting caught overloaded at a regular scale. Therefore, there is no advantage to the Company to have Complainant run around a weigh scale. (Tr-359-60).

Mr. Cooper continued, that once a driver gets her first ticket, under Tennessee law she is entitled to continue on through the state. Should the driver be found to be overweight at any subsequent weigh station, all she has to do is show the ticket and she would be allowed to proceed on. (TR-359-60). According to Mr. Cooper, there was absolutely no need to route Complainant around weigh scales in Tennessee.

As for the allegation that Complainant was routed around weigh scales in Arkansas, Mr. Cooper said, again, there was no reason to do so. Given the amount of fuel that Complainant would have burned off by the time she got to Arkansas, her total weight would have allowed her to continue on through Arkansas. The state of Arkansas has a one percent tolerance rule, under which Complainant would not have been ticketed. (TR-360-62).

The record shows that Complainant's contention that Maverick rerouted her around scales in either Tennessee or Arkansas was unreasonable. The Complainant has failed to show that she ever complained about or resisted Maverick's alleged efforts to require her to overload her truck or to run an overloaded truck around weigh scales in violation of state laws.

II. CONCLUSION

There is no evidence that the Complainant reported log or hour violations to the Respondent. The fact that Maverick was charged with several instances of log violations in 1993 by the Federal Highway Administration is insufficient to support the Complainant's claim that she was wrongfully discharged for resisting or reporting any illegal or unsafe activity. The burden is on the Complainant to provide evidence that she made such reports. Her statements to Hugh Brown that she did not like being handed more than one log book at a time are not sufficient to show that she intended to report safety violations to her employer. As well, the Complainant never mentioned the matter to anyone else in management when she had opportunities to do so.

As well, the Complainant failed to show that she complained about being required to run overweight loads, where she made no communication with any of her supervisors to that effect, and Maverick's policy is clearly stated that the driver bears the sole responsibility for loading her vehicle. In spite of Complainant's testimony that she was routed around weigh scales with an overloaded truck, the Complainant provided no evidence that she made complaints or reports of safety violations to the Employer. Even if the Complainant's alleged resistance to driving around scales is presumed to constitute protected activity, the Complainant's testimony that she was routed around scales is not credible. The Complainant testified that she was overweight by 4000 pounds, although the Overweight Assessment revealed the overweight amount was only 1260. As well, there was no incentive for Maverick to route the Complainant around scales when she would have been immune from penalties after her initial ticket.

Finally, Complainant's application for unemployment compensation contradicts her claim that she was wrongfully terminated. After she was fired, Complainant stated on her application for unemployment compensation that the reason for her discharge was "got hurt on the job." (RX-1 at 108). Complainant made no mention of the possibility that she had been fired in retaliation for reporting safety violations.

Accordingly, I find that the Complainant has failed to show that she engaged in protected conduct or that the employer was aware of any protected conduct at the time the Complainant was discharged. The Complainant has failed to set forth a *prima facie* case of retaliatory discharge.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend that the complaint filed by Loraine White be DISMISSED.

RICHARD K. MALAMPHY
Administrative Law Judge

Newport News, Virginia
RKM/lrb